



POLICE DEPARTMENT

September 21, 2009

MEMORANDUM FOR: Police Commissioner

Re: Detective Andrew Amplo
Tax Registry 923505
Narcotics Borough Brooklyn North
Disciplinary Case No. 84269/08

The above-named member of the Department appeared before me on June 03, 2009, charged with the following:

1. Said Detective Andrew Amplo, assigned to Narcotics Borough Brooklyn North, while on-duty, at about 2235 hours on January 24, 2007, at the 83rd Precinct Stationhouse, Kings County, used excessive physical force against an individual known to this Department, while engaged in a physical altercation with said individual in a cell, causing injury to said individual's eye.

P.G. 203-11, Page 1, Paragraph 2 – USE OF FORCE

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate's Office, and the Respondent was represented by Peter Brill, Esq.

The Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent is found Not Guilty.

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SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department offered the out of court statements made by Complainant Waliek Flowers. Flowers did not appear at trial. On January 25, 2007 at 0115 hours, Flowers was interviewed by a Department investigator and the tape and transcript were admitted into evidence as Department Exhibit (DX) 1 and 1A, respectively. On January 25, 2007 at 1735 hours, Flowers was again interviewed by Department investigators and the tape and transcript were admitted into evidence as DX 2 and 2A, respectively. On February 21, 2007 at 1155 hours, Flowers was interviewed by an investigator for the Civilian Complainant Review Board and the tape and transcript were admitted into evidence as DX 3 and 3A, respectively.

Introduction

The complainant, Waliek Flowers, was arrested for marijuana possession. At the scene of his arrest he admittedly fought with the apprehending officers. The two officers involved in the altercation complained of injuries and one of the officers received treatment at a local hospital.

Flowers was taken to the stationhouse where he was placed in a holding cell. At one point, he had a physical altercation with the Respondent where Flowers claimed he was struck by the Respondent while handcuffed, causing him to sustain a laceration over his left eye. He was taken to Woodhull Hospital for treatment and as indicated in his medical records (DX 4) he told medical staff that he had been hit by a police officer "during his arrest."

As noted, Flowers did not testify at this Department trial. The Assistant Department Advocate informed this Court that the Department learned in January 2009 that Flowers had a pending criminal case in Brooklyn Criminal Court. On February 26, 2009, the Department sent Detective Padilla, from the Litigation Support Unit, to Brooklyn Criminal Court where Flowers was scheduled to appear to serve him with a Department subpoena for this case. Padilla waited for an hour but Flowers did not appear. It was subsequently learned that he appeared that afternoon.

On March 25, 2009, Padilla went to Flowers' home address to personally serve him with a subpoena but he was not at home. His aunt accepted the subpoena for him. On April 9, 2009 a subpoena was mailed to him and a return receipt was signed and returned to the Department.¹ On April 27, 2009 the Department learned that Flowers had a bench warrant issued for his arrest and on May 5, 2009 Padilla again went to his home to serve him with a subpoena. Since no one was home he affixed the subpoena to his door. On May 11, 2009 another subpoena was mailed to him and on May 12, 2009 Padilla again went to his home and was told by his aunt that Flowers was in Boston and she did not know when he would return or how to contact him.

Flowers was interviewed three separate times and his out of court interviews were admitted into evidence as part of the Department's case.

Interview of Waliek Flowers on January 25, 2007 at 0115 Hours

Flowers told a Department investigator that he had been helping a friend look for a lost phone card earlier that night and was on his way home when police officers "jump[ed] out" and "start[ed] checking" him for no reason. Flowers acknowledged that

¹ This Court was not informed as to who signed the subpoena.

because he “shouldn’t be getting checked...I was resisting arrest, I know that, I was wrong for that,” and stated that he was eventually arrested and taken to the precinct in a car. Flowers further stated that the “black sergeant” at the front desk “he seen my face, he seen my face was swollen. I wasn’t bleeding when I came to that precinct.” He explained that his face was swollen from the police officers “putting me on the floor, stomping, putting their knee under my face and all that.”

Flowers told the investigator that when he got to the precinct, he was taken to the back and “they’re getting ready to check me, Brooklyn Narcotics, two of the officers came back there and tell them ‘no, we got him.’ One officer stood at the cell, the other wondered in the cell going to just punch me in my head.” Flowers described the officer in question as “a white guy” a little shorter than himself, with black hair. He stated that the officer was wearing Timberland boots, blue jeans, and a blue hooded sweatshirt.

Flowers continued to describe the officer’s behavior at the scene stating that:

And he’s talking about “oh, we’re getting sick and tired of you, and that’s why you busted,” that’s why he said he’s going to bust me, and I kept saying, I kept talking asking him “Why you punch me?” He act like he’s going to hit me some more...and he’s going to go get tissue and all that, wiping me down, trying to wipe me, wipe it down [the blood]. I asked him “Why are you wiping it down for, you shouldn’t have hit me at all, cause I ain’t do nothing.” I see as I was back there awhile and I was just back there asking them, saying “please Lord, please Lord,” and he just hit me.

Flowers told the investigator that there were no words exchanged between the officer and himself before the officer hit him. Flowers stated that he was taken to the precinct by “blue and whites” before the plainclothes officers took over, and that he was just in a cell being quiet when the officer came back and hit him. He stated that his hands were handcuffed at the time explaining that, “My hands wasn’t loose. I wasn’t swinging,

I wasn't fighting him, none of that. My hands was cuffed. I was sitting down when he punched me. And he punched me like two times in my chest, in my stomach and all that." Flowers further stated that he started yelling, and that the uniformed sergeant from the desk came back there. He said that:

...they came back there and they looked and they was like, and they started shaking their head...But he's still in there with me trying to calm me down like "shhh, shhh, shhh." I'm like "I ain't shutting up. You just bust my head open, I'm not shutting up," he done bust my head open for no reason. I'm not going lie, sit and lie. I was wrong for resisting arrest. I ain't, no officers got hurt for it. All I was doing I wasn't letting them put the handcuffs on me. Because I felt like, what did you all stop me for, was for no reason at all, at all. You're just stopping people just to stop them. Even though I had two bags of weed. I smoke. But you're just stopping people for no reason.

Flowers told the investigator that he was moved from the cell where he was bleeding to a different adjacent cell "cause they wanted to clean the blood up."

Flowers said that he was not aware that an officer was injured when he initially resisted arrest, but that he heard something about it later. He stated that both of the officers who had arrested him were in the precinct doing paperwork, so it couldn't have been them.

Flowers said that the Respondent hit him in the eye and that he was bleeding. He stated "...I'm like ah, ah, ah, 'Why are you going to hit me in my eye?' He's started punching me in my chest and my stomach real hard. I'm looking at him like, 'Why you, why are you doing this?'" When asked what happened after that, Flowers said that he "started screaming like 'I want to see somebody, I want to see somebody.' 'Oh no, you ain't gonna see nobody. You're just going to sit here.' They kept coming back there, 'oh, put this water on your face, wipe your face guy, you got a lot of blood.' Why are

you worried about me washing my face? I want to see somebody 'cause I shouldn't have gotten hit like this."

Flowers reiterated that he had been handcuffed, and, "I wasn't like I had my hands free and I struggled and I hit somebody." He stated that he went to the hospital 20 or 30 minutes later. When asked if anyone else came back to talk to him in the interim, Flowers said that the only time they came back there to talk to him was "to try to calm me down cause they didn't want no (inaudible) they didn't want their fellow officer to get in trouble."

When asked which of the officers he had dealt with that night had arrested him before, Flowers stated that he "forgot their name," but that he was familiar with all of them because they are from the same unit. He told the investigator that two officers brought him to the hospital, and that he had not been allowed to contact his family and alert them of his injuries. Flowers stated that the officers had been with him since he got there, and that nobody else had come to talk to him until the investigator arrived.

Interview of Waliek Flowers on January 25, 2007 at 1735 Hours

During this interview, Flowers told Department investigators that at 10 o'clock the night before, he had been helping a friend named Russ look for a lost phone card and was on his way home when police officers suddenly jumped out of their truck and started checking him. Flowers stated that he was carrying marijuana on his person, and that he knew they were cops, "Cause when they get out they say 'hey, freeze.'" Flowers also said that he knew one of the cops, the male cop, from having been locked up before for marijuana possession. He added that both the male and female cops were white. He

described the male as being “a little chubby” and the female as being, “short and little, she looked thick.” Flowers acknowledged that he had been imprisoned a couple of times before this incident, “But this never happened to me. All the times I got locked up this never happened to me, never.”

Flowers told investigators that “they didn’t see me buy no weed with nobody, I wasn’t doing nothing. So they just jumped out. It was a lady and him the guy.” Flowers noted that he told the officers about the marijuana before they found it, and that they told him to put his hands behind his back, as he was under arrest. Flowers stated that he was making noise and yelling, but that he was not using his hands, as they were being held behind his back by the male cop while the female cop stood in front of him. Flowers said that he expressed anger and started pulling away from them, “Then they got me down and they called more police because people started coming outside.” Flowers stated that he did not pull his hands free while he was trying to avoid getting handcuffed, and that he did not make any physical contact with the female. Flowers said, “I didn’t put my hand on nobody. They can’t say ‘oh he raised his hand up...’”

When asked how the police officers got him down, Flowers told the investigators that he was “...going to the floor, knee in my face.” He told them that that was how he got the little scar on the right side of his face, stating, “Yeah. That’s when they put their knee in my neck and stuff they had me ... this metal thing that was holding me down and all that.” When asked to describe the object further, Flowers continued, “Where we was at it’s just like this, almost this thing for a cable box, for cablevision, a box. They got up a big box and it was a metal thing right by it...” Flowers explained that he “hit the metal thing,” and that when he got to the 83 Precinct, all he had was a mark on his face.

Flowers said that he told the sergeant in front that it was his fault for resisting arrest and that he was told to "just go sit back, everything's going to be alright." Flowers stated that "the Black Sergeant could tell you, cause I was standing in front of him talking, he, he could tell you that man didn't come in here bleeding, he already know that. I had no, and there was so much blood, look so much blood."

According to Flowers, he was taken to the back by the two "blue and white officers," and then other plainclothes officers, also from Brooklyn North Narcotics, came over. Flowers said that he knew them, and that one was tall and one was short and skinny, with short curly black hair. Flowers was unsure if the short cop was white or Hispanic. He stated that there was no one else in the cell at the time.

Flowers stated that the tall one stood outside the cell,

On the other side to look to see if nobody was coming. So I guess he told him, he looked at him and like when he looked at him he just punched me in my face, boom, cut me right here and start punching while I had the handcuffs on. 'Cause when they took me back there I was straight calm, I didn't say nothing. I was getting ready, I thought they were getting ready to check me, fingerprint me or stuff. I was straight calm.

Flowers told investigators that this was the second time that the officer in question had put his hands on him, stating,

The first time I ain't, I ain't pursue it cause my, I, I was wrong for cursing and all that, but I felt that but, at this time I didn't do nothing. He had nothing to do with what I got locked up for out on the street, he just came in there and just bust my whole head open. He bust my head open and I don't (inaudible) because he had a ring on or nothing. I had a whole bunch of fights with people and this, this never happened to me, okay, never.

Flowers told investigators that he was handcuffed and so he couldn't do anything, and that the officer hit him in the head, then in the chest and stomach. Flowers stated that after the officer hit him, the officer tried to calm him down, and gave him some tissue to

wipe his face. Flowers said he was told to put water on his face, and was moved to a different cell, "...so they could clean up the blood and all that. So I'm standing there making noise, like I wanted to see a head superior 'cause I know this ain't right, I didn't come here like this, I didn't come here like this."

Flowers told investigators that he was accompanied by another two plainclothes officers to see a doctor at Woodhull Hospital, where his face was sewn up, before he was brought to Central Booking. When asked if he had been told how many stitches were put in, Flowers responded that, "Nah, I didn't check. They don't know how it happened."²

When shown photographs, Flowers was able to identify his arresting officer (not the Respondent) and the female officer who had assisted in the arrest.³

Interview of Waliek Flowers on February 21, 2007 at 1155 Hours

During this interview, Flowers told investigators essentially the same story that he told during the two earlier interviews (although he made reference to a Doc and a Damon when discussing the phone card search instead of a friend named Russ). He added that during the arrest, the male officer was "trustling with me, pushing me like I'm asking him 'Why are you going so hard on me like this?' So I started yelling, like 'Why are you doing this to me?' So a lot of people start coming out. So they calling backup like people are going to hurt them, then they just jumped me to, threw me to the floor, boom, boom, boom, wrestling me to the floor. They got me, they already got the handcuffs on me." Flowers stated for the record that he was not resisting at all, nor was he pulling on

² Medical records contain doctor's notes which read in relevant part: "Patient stated that he was punched by an officer during his arrest."

³ The investigators did not reveal the identity of the officers in the photographs during the interview.

the handcuffs. He said that he never took a swing at either of them, nor did he kick either of them, nor did he ever have any physical interaction with the female officer.

Flowers further told investigators that he sustained injuries during his actual arrest, when after he was handcuffed, he was taken down to the floor. According to Flowers, he was in handcuffs, leaning on the trunk of a car. The male officer called for backup and within a few minutes more police officers arrived. Flowers stated that, "I wasn't moving from side to side or nothing. I'm telling them 'I'm not resisting arrest, I'm not resisting arrest.' So they just jumped out the car, boom, boom, boom." Flowers said that he did not see exactly who took him to the ground, but, he stated, "they jumped on me" and he went down on the floor "face first." According to Flowers, one of them, a male uniformed officer, had his "knee in [his] neck" so that he could not move his head. There was also an officer holding down his legs.

Flowers reiterated that he was not bleeding when he got to the precinct, and added that "they got cameras inside of the precinct." Flowers acknowledged that he had a "little scar" or a "little scrape" and some swelling on the right side of his face, from having been thrown to the ground face first. Flowers stated that he was taken directly to the desk sergeant, a black male with short gray hair and a little beard who told the two uniformed officers who had driven him there (not the same ones from the arrest) to take him to the back so that he could be searched.

Describing the alleged assault, Flowers said that when they got to the cell area, "the plainclothes officers told, or came back there after, and told them, 'oh, we got him' ... I'm inside the cell already. So the white guy's standing out the cell, the tall white guy was out the cell. So I'm sitting down like this, and he just going to say 'oh, we're

sick and tired of your mess' and he bust me in my head, boom and they keep beating on me, boom, boom." Flowers said that both of his hands were handcuffed behind his back at the time, that the officer hit him with his right hand with a closed fist, and that he was cut right above his left eye with the first hit. Flowers stated that the officer continued hitting him with both hands, in the face again and then in the chest, stomach, and ribs. He added that "he punched me like four or five times"—twice in the head and "three times in the body."

Flowers told investigators that after the officer hit him, he told him not to make any noise, and to turn around so that he could remove the handcuffs. Flowers stated that at first he refused:

I'm like "no, I'm not taking this handcuffs off. I want your superior officers to come back here and see what kind of man you is. You're going to hit somebody with handcuffs 'cause you can't say that I, I was rowdy because the black desk sergeant is gonna check it when you came, when he was in front of the desk he was calm. You came back here, and did something to him..."

Flowers stated that after a while he let another officer take the handcuffs off of him, and that he was moved to a second cell. He said that after a while, "the desk sergeant came back there and looked and was shaking his head, like he knows like that they just came back here and did that, because when I was in front of him I wasn't bleeding." Flowers stated that the cut above his left eye and swelling in the face were injuries from this encounter.

Flowers stated that at the hospital, "They gave me stitches and stuff but the doctor was asking them, asking me, 'how did this,' the person who was doing the stitches said 'how did this happen, somebody cut you?' Because he said 'this don't look like nobody

punched you.' I said 'no, the officer punched you.'” Flowers did not remember if the officer had been wearing any rings.

Describing the follow-up to the incident, Flowers noted that the arresting officer, who had complained of Flowers injuring him, had not gone to the hospital or gotten a report.

The Respondent's Case

The Respondent called Detective Michael Separ as a witness. The Respondent also offered out of court statements made by Detective Megan Barone, Sergeant O'Brien, and Sergeant Walker. On November 27, 2007 at 1040 hours Barone was interviewed by Department investigators and the tape and transcript were admitted into evidence as Respondent Exhibit (RX) A and A1, respectively. On November 29, 2007 at 1130 hours O'Brien was interviewed by Department investigators and the tape and transcript were admitted into evidence as RX B and B1, respectively. On February 8, 2007 at 1038 hours Walker was interviewed by Department investigators and the tape and transcript were admitted into evidence as RX C and C1, respectively. The Respondent also testified in his own behalf.

Detective Michael Separ

Separ has been employed by the NYPD for approximately 10 years, and has been serving in the rank of detective for about three years. He has held his current assignment, as a member of the Brooklyn North Narcotics Division, for approximately four and a half years. His duties there include identifying narcotics activity on the street level, working

cases in order to identify those individuals committing narcotics activity in certain areas of Brooklyn, and arresting the guilty parties. Separ is a member of the 83 module, and on January 24, 2007, was assigned to that module, along with the Respondent.

Separ testified that he was working the chase car that day, and that he responded to a 10-85, a police radio transmission that means that an officer needs assistance. Separ said that when he arrived, amidst a mass police response, he found out that O'Brien, the team leader, and Barone had been in a confrontation with a male that they were trying to arrest. Separ stated that at some point he learned that Flowers was the name of the arrested person, and that he did not believe that he had any previous knowledge of him before the day in question.

Separ stated that after the scene was safe he returned to the 83 Precinct stationhouse. He testified that in general, the people assigned to the chase car will help the officers assigned to the prisoner van search the prisoners when they get back to the stationhouse, and settle them into cells. Flowers was taken to the precinct in a marked police car, and arrived ahead of the prisoner van. The Respondent arrived with Separ in the chase car.

Separ testified that he and the Respondent took custody of Flowers at that time and brought him into the rear cell area to be searched. Separ explained that, as per procedure, the search begins with the outermost garments and from there to the other garments that the person in custody is wearing. He acknowledged that in order to facilitate the search and allow the person to remove their outer garments, the individual's handcuffs are removed prior to their being searched. He stated that this procedure was done with Flowers.

When asked to describe the cell area, Separ stated that, "As you walk to the rear cell area, you walk in through a double-gated door, you can walk to the left or the right. We walked to the left side." Separ told the Court that he and the Respondent were both with Flowers in one of the cells on the left side of the cell area, and had started the search of the outermost garments, when the prisoner van officers entered the precinct and brought their prisoners to the right side of the cell area. Separ explained that there were only two officers there at the time and four or five other prisoners, so he left the Respondent and walked to the right side of the cell area to help the prisoner van officers lodge the prisoners.

Separ said that after 30 seconds to one minute he heard a "wrestling sound" coming from the area where he had left the Respondent alone with Flowers, and that he immediately walked back there. Separ stated that he saw the Respondent on the ground with Flowers, attempting to rear-cuff him. Separ testified that both the Respondent and Flowers were on the ground, and that the Respondent had one cuff on Flowers and was attempting to put the second one on. According to Separ, Flowers "...was flailing his hands and struggling. He was resisting to be cuffed again...He was in an agitated state. He was cursing a lot. Generally ranting, you know, no real train of thought in what he was saying." Separ said that he assisted the Respondent, and that they tried to calm Flowers down. At one point, when they had decided that he was ready, they resumed searching Flowers.

Separ stated that he had observed that Flowers had an injury in the form of a cut on his forehead, and that an ambulance was called to the precinct to transport Flowers to the hospital. Separ stated that at no point while he was present did he see the Respondent

strike, or hit, or in any way have aggressive physical contact with Flowers while Flowers was handcuffed, nor did he see the Respondent hit Flowers in an unprovoked manner even while he was uncuffed, except for the physical contact he had while he was struggling with Flowers. Separ also testified that from his personal observation and experience in that module, the Respondent would have no motivation to hit Flowers.

On cross-examination, Separ acknowledged that when he first brought Flowers into the cell with the Respondent, he had to leave to deal with other prisoners and that when he came back to the cell he observed the Respondent attempting to handcuff Flowers. He reiterated that Flowers had one handcuff on at the time, and that they were both on the ground. Separ further acknowledged that he did not know what led up to the struggle to recuff Flowers, and that when he was at the initial arrest scene he did not see the Respondent at all.

Interview of Detective Megan Barone on November 27, 2007 at 1040 Hours

Barone told Department investigators that on January 24, 2007, at approximately 2237 hours, she was assigned to Brooklyn North Narcotics in plainclothes, and was working with O'Brien in arresting Flowers. Barone testified that they had observed him selling marijuana hand-to-hand, and that the other person got away.

Barone said that Flowers was already standoffish when they approached him, since she had already arrested him in the past. Barone told the Court that when they went to arrest Flowers, he began to fight with them, "Tried punching us. He kicked me in the stomach, ended up rolling around on the floor and that was it." Barone said that she called a 10-85 over the radio, and that Flowers was not handcuffed until other units

arrived. She recalled there being a cable box in the vicinity, because she hit herself on the box when they were fighting on the floor. She did not recall if Flowers said that he hit it as well, or if he had a laceration on his upper eye at the scene. She testified that she did not have an opportunity to see if he was injured in any way at the scene, because as soon as the other officers arrived they handcuffed him and took him away. Barone recognized the cable box when she was shown pictures of it, and when asked if it was possible that Flowers could have sustained his injury from striking it, she responded, "Absolutely." She noted that she had hit her own body against it, and that when they were struggling they were right up against the box.

Barone testified that although she was injured during the struggle, having been kicked in the stomach and with bruises on her arms and general soreness, she went back to the stationhouse and not to the hospital. She added that her sergeant had gone to the hospital for injuries that he had sustained. Barone did not know who had taken the prisoner to the back cell area, and stated that the next time she saw him was when they were taking him to the hospital. Barone said that she did not witness anyone in the precinct hit Flowers with any object or anything. She stated that she hit him during the course of their struggle with her hands and no other objects and that it was done in self-defense as Flowers kicked and fought and resisted being handcuffed. She noted that Flowers tucked his hands underneath his body, and that it took several officers to bring him under control. Barone acknowledged that she did not notice the cut when Flowers was out there, and added that it is fair to say that she was getting herself together after getting up off of the ground.

Interview of Sergeant O'Brien on November 29, 2007 at 1130 Hours

O'Brien told investigators that on January 24, 2007 at approximately 2237 hours, he was working as the Narcotics Supervisor for the 83 module, and was with Barone. O'Brien said that they witnessed Flowers completing a marijuana transaction, and that they lost the unidentified person that he had dealt to. O'Brien said that when he grabbed Flowers and placed him under arrest there was a violent struggle, "I mean it as a knock out, kick out fight, he was swinging, the whole nine yards... We flipped over the car, flipped over the trash, flipped over everything that was there." O'Brien said that he called a 10-85. He also noted that he had arrested Flowers in the past for a previous marijuana sale, "And he's a cop fighter. I mean he fought me and now he was kicking Officer Barone and, you know, I was holding on to him, it was a violent struggle."

O'Brien told investigators that he had lacerations on his arm from the fight, and went to Wyckoff Hospital. He recalled that Barone had suffered injuries too, but did not remember what they were. He said that he believed there was a cable box there, but did not recall if Flowers had a laceration over his eye. O'Brien stated that it was possible that Flowers banged his head on the corner where they were fighting. He did not know who had transported Flowers to the precinct.

O'Brien said that he went back to the stationhouse, and that shortly thereafter an ambulance was called to take him to Wyckoff Hospital. He stated that he was hurting, that he didn't see Flowers at the stationhouse, and that he didn't know if Flowers was bleeding at all. O'Brien said that he did not know who took Flowers to the cell area, but that he was aware that the Respondent had had an altercation with him inside the cells.

O'Brien said that he was back in the stationhouse when Flowers came back from the hospital with a bandage over his eye.

O'Brien stated that he did not witness anyone at the stationhouse strike, kick, or hit Flowers, nor did he strike, kick or hit him at the stationhouse. O'Brien further stated that any injury to Flower's eye or head would be consistent with the fight that he had with Flowers.

Interview of Sergeant Walker on February 8, 2007 at 1038 Hours

Walker told Department investigators that during the evening of January 24, 2007, he was working as the Desk Officer at the 83 Precinct. Walker was shown a photograph of Flowers, which he recognized. When asked if he had noted anything unusual about Flowers when he walked into the stationhouse that night, Walker said that, "He was disruptive. Had a little abrasion on his face. He was, you know, giving the officers a hard time, you know, saying he wasn't supposed to be here, you know...to be arrested." When asked where the abrasion was Walker responded that it was, "Along his face. It was just...On his eye, mainly under the eye area." Walker stated that Flowers was not bleeding, but that he could not remember the exact location of the eye injury and whether it was to the left eye or the right eye.

Walker was shown the Command Log entries from that night, but said that he did not remember Flowers being disruptive, nor did he see him being disruptive, although he knows that he was disruptive. Walker acknowledged that Flowers had sustained injuries inside the cell area, and that he was transported to the hospital. Walker said that one of the team members informed him of the incident in question, and that Flowers did not

make any statement to him as to what had happened. When asked if he had learned what had happened in the cell area, Walker responded, "The perp in the cells. The narcotics guys they went to, you know, talk, to remove the cuffs. When they removed the cuffs I was told that he fought and got hurt."

The Respondent

The Respondent is a 10-year member of the Department currently assigned to the Brooklyn North Narcotics Division. On January 24, 2007, the Respondent was working in the 83 module, and at that time he had been working there for about two years.

The Respondent testified that he had in fact encountered Flowers prior to the incident in question, having arrested him in the past. The Respondent testified that he had had a problem with Flowers, who had resisted arrest the previous time. The Respondent acknowledged that it is not uncommon for people to resist arrest, and that he hadn't had any additional contact with Flowers from the previous time that he arrested him until January 24, 2007.

Describing the events of that night, the Respondent testified that he had been working with Separ, assigned to the chase car and doing narcotics enforcement. The Respondent said that he and Separ responded to a 10-85 from members of their field team who had encountered Flowers and needed assistance. The Respondent said that there was a large crowd already gathered when they arrived on the scene, and that they observed Flowers being escorted to a car already handcuffed, yelling, kicking, and refusing to walk with the police. The Respondent stated that he had no personal contact with Flowers at that time.

The Respondent stated that the next thing he did was respond to the 83 Precinct stationhouse for arrest processing. He and Separ arrived ahead of Flowers and about five minutes before the rest of the field team. The Respondent explained that every night they divide the labor, arrest paperwork, vouchering and searching of the prisoners and that on that night he was assisting with searching the prisoners in addition to other things. The Respondent stated that the only prisoner present at the time was Flowers, and that he followed the normal procedure in searching prisoners on that day. He explained that the procedure is to bring the prisoners into a holding area, a private cell generally, and conduct a search. According to the Respondent, Flowers was brought into a separate cell, and was, "Still yelling, still cursing. I don't remember his exact words but he wasn't conducting himself in a calm manner. He was very irate until the point he was into the back cell. Before I uncuffed him, I tried to calm him down. I don't know how much I really succeeded. At that point, he had to be searched, so I placed him in the cell, I uncuffed him, at that point is when he took a swing at me."

The Respondent testified that Flowers had calmed down enough that in his opinion it was safe to search him, saying, "A lot of people are still agitated when they are being searched, and you know, things go fine. It doesn't mean they necessarily fight the police." The Respondent acknowledged that up until that point in time Separ was with him, but that Separ left the Respondent alone with Flowers to go and assist with the rest of the prisoners who were being brought into the stationhouse. The Respondent stated that he was fine with that, and that this was something that had been done in the past.

The Respondent stated that when he uncuffed one of Flowers' hands, he (Flowers) took a step back and took a swing at him. The Respondent said that in response

he went towards Flowers and tried to hold his arms down, and brought him to the ground. He described the cell as “very small...approximately seven feet long and I would say four feet wide, and in that four feet there is a bench coming out which would make it even tighter.” The Respondent said that he and Flowers were both between the wall and the end of the bench, and that they were side by side, with the Respondent ordering Flowers to put his hands behind his back and attempting to gain control of Flowers’ hands in order to handcuff him. The Respondent stated that he managed to handcuff Flowers at about the same time that Separ arrived back to assist. The Respondent said that he closed the cell, had Flowers calm down, and informed his supervisor of what had happened.

The Respondent stated that when he locked the cell he observed that Flowers was bleeding from his head. He testified that he did not know specifically how Flowers had gotten injured, “but I can speculate that either he hit his head on the bench or the cell area or the floor.” The Respondent testified that he never hit Flowers with a fist or open hand while he was interacting with him, that he never hit Flowers while he was handcuffed and then uncuffed him to make the story look better, and that he had no reasons to hit Flowers while he was handcuffed. He also testified that he had no past anger towards Flowers, and that as far as he can remember, he didn’t even realize who Flowers was “until after all the smoke had cleared...”

The Respondent reiterated that from the time that he encountered Flowers in that cell until the time that he closed the cell door, he did not strike Flowers causing his injury.

On cross-examination, the Respondent acknowledged that he had arrested Flowers previously, and that Flowers had resisted arrest on that occasion. The

Respondent stated that he did not know it was Flowers when he got to the arrest scene on January 24, 2007, because there was a large crowd, and because he had made a lot of arrests. He testified that he was aware that Barone and O'Brien had been injured arresting Flowers.

The Respondent testified again that as he was uncuffing Flowers, Flowers took a swing at him. The Respondent stated that he was not injured, and did not generate a complaint report for Flowers attempting to assault him in the cell. He acknowledged that there should have been a charge of assault, saying that, "I guess with everything going on it wasn't added, but it should have been an attempted assault charge."

FINDINGS AND ANALYSIS

The Respondent is charged with using excessive force against Flowers while he was in the stationhouse cell and causing him to suffer a laceration to his eye.

Flowers did not testify at this Department trial. The Department made numerous attempts to have him appear, including going to his home and leaving a subpoena with his aunt on one occasion, and affixing one to his door on another. The Department also mailed subpoenas to his home. When the Department investigator last visited his home, his aunt told him that Flowers was in Boston and could not be reached. Considering the many attempts the Department made to contact Flowers, this Court is convinced that, at the very least, Flowers was made aware that it was important for him to contact the Department Advocate's office with regard to this case. Additionally, the Department learned that Flowers had a bench warrant issued for his arrest. The consequence of all of

this is that this Court is left to rely on the hearsay statements Flowers made during his three interviews with investigators.

During those interviews Flowers portrays himself as a victim of the police, sometimes gratuitously admitting to wrongdoing and at other times denying committing any wrongdoing. For example, during his first two interviews he told investigators that on January 24, 2007, he had been helping a friend look for his lost phone card and was on his way home when police officers, a male and a female, “jumped out” of their truck and started “checking” him for no reason. He knew that they were police officers but believed that they had no right to do this. He freely admitted during those interviews that he resisted arrest, stating, “I was resisting arrest, I know that I was wrong for that....no officers got hurt for it. All I was doing I wasn’t letting them put the handcuffs on me. Because I felt like, what did you all stop me for was for no reason at all, at all.” He also freely admitted that he had marijuana on him at the time.

In his last interview, however, he stated that he did not resist arrest. He stated that he told the officers, “I’m telling them ‘I’m not resisting arrest, I’m not resisting arrest.’ So they just jumped out the car, boom, boom, boom.” One of the officers took him to the ground and “they jumped on me” and he went to the floor “face first.” Flowers stated that when he was thrown to the ground face first, the officer had his knee in his neck and the side of his face “hit the metal thing” which he described as resembling a cable box. He stated that is what caused the mark on his face. Flowers further denied that he “put [his] hand” on the officers stating that “they can’t say ‘oh he raised his hand up...’” He also said that he never took a swing at either of them, nor did he kick either of them, nor did he ever have any physical interaction with the female officer.

Flowers stated that when he was taken to the stationhouse, he was taken to one of the cells by the officers who transported him there. Flowers described himself as “straight and calm, I didn’t say nothing. I was getting ready; I thought they were getting ready to fingerprint me or stuff. I was straight and calm.”

Flowers said that the officers who brought him to the precinct were then replaced by two other officers in plainclothes. One was tall and one was short and skinny. According to Flowers, the tall one stood outside the cell and the other officer then punched him in the face and was punching him while he had the cuffs on. He stated that the officer who punched him in the cell “had nothing to do with what I got locked up for out on the street, he just came in there and just bust my whole head open.” He quoted the officer as saying “‘...we’re getting sick and tired of you,’ and...that’s why he said he’s going to bust me...” Flowers told investigators that he was handcuffed and so he could not do anything and that the officer hit him in the head, chest and stomach. According to Flowers, the officer then tried to calm him down and gave him tissues to wipe his face. Flowers was taken to the hospital and received stitches for his cut before he was taken to Central Booking for processing.

The officers involved in this case, including the Respondent, portray Flowers in a different light; they do not view or describe him as the victim, but as the violent aggressor in this case.

Sergeant O’Brien and Detective Barone were the officers who arrested Flowers. They did not testify at trial and their interviews with investigators were admitted into evidence under the exhibits previously mentioned.

O'Brien observed Flowers complete a sale of marijuana to an unapprehended individual. When he grabbed Flowers to place him under arrest he described Flowers' attempt to resist arrest "as a knock out, kick out fight. He was swinging, the whole nine yards... We flipped over the car, flipped over the trash, flipped over everything that was there." He remembered Flowers from a previous arrest for a marijuana sale and further described him as, "A cop fighter. I mean he fought me and now he was kicking Officer Barone and, you know, I was holding on to him, it was a violent struggle."

O'Brien stated that as a result of his physical struggle with Flowers, O'Brien had a laceration on his arm that required treatment at a local hospital. He also stated that any injury that Flowers to his head or eye would be consistent with the fight he had with Flowers.

Barone also observed Flowers selling marijuana to an unapprehended individual. As she approached him she knew that she had arrested him in the past. When she and O'Brien attempted to place him under arrest Flowers "tried punching us. He kicked me in the stomach, ended up rolling on the floor..." She stated that as they were fighting on the floor they went up against a cable box and she hit her body against it. She was not sure if Flowers also hit the box. Flowers also tucked his hands under his body to avoid being handcuffed and it took several officers to bring him under control.

Barone had pains to her stomach as a result of being kicked by Flowers. She also sustained bruises on her arms and general soreness. While O'Brien went to the hospital for his injuries, Barone opted to return to the stationhouse.

Separ first saw Flowers when he was engaged in a confrontation with O'Brien and Barone as they were attempting to arrest him. Separ stated that he and the

Respondent took custody of Flowers in the stationhouse when they brought him into the rear cell to be searched. He informed the Court that there is a search procedure to follow when a prisoner is brought to the stationhouse. He explained that the search begins with the outermost garments and any other clothes that the person is wearing must be searched. When it is necessary for the outer garments to be removed, the individual's handcuffs are removed prior to being searched. This procedure was done with Flowers.

Separ told the Court that he and the Respondent were both with Flowers in one of the cells and had started the search of the outermost garments, when the prisoner van officers entered the precinct and brought their prisoners to the cell area. Separ explained that there were only two officers there at the time and four or five other prisoners, so he left the Respondent and walked to the right side of the cell area to help the prisoner van officers lodge the prisoners. A short time later, Separ heard a "wrestling sound" coming from the area where the Respondent and Flowers were. Separ immediately went to them and saw the Respondent on the ground with Flowers, who had one handcuff on, attempting to handcuff him. He saw Flowers flailing his arms and struggling to resist being handcuffed again. Flowers was agitated, ranting and cursing. Separ assisted the Respondent to calm Flowers. A decision was then made to continue the search. Separ then saw a cut on Flowers' forehead.

Sergeant Walker was working the stationhouse desk when Flowers was brought in. He remembered that Flowers was disruptive and giving the officers a hard time complaining that he should not have been arrested. Walker saw a little abrasion on his face under his eye but noted that he was not bleeding. He acknowledged that Flowers sustained injuries inside the cell area and was taken to the hospital.

The Respondent worked with Separ on the day that Flowers was arrested. They had responded to a call from their field team because of Flowers resisting arrest. The Respondent saw that a large crowd had gathered at the scene of Flowers' arrest and he observed him being led to the van handcuffed, yelling, kicking and refusing to walk with the police.

The Respondent did not transport Flowers to the stationhouse. His job that day was to assist in the searching of prisoners. Flowers was brought into a separate cell to be searched. Separ was with the Respondent when he tried to calm Flowers down before he uncuffed him to conduct his search of him, but prior to removing his handcuffs, Separ left to assist with other prisoners.

At one point, when the Respondent uncuffed one of Flowers' hands, he (Flowers) took a step back and took a swing at the Respondent. In response the Respondent went towards Flowers and tried to hold his arms down, and brought him to the ground. He described the cell as very small and only seven feet long and four feet wide. Also in the cell was a bench which made the space even smaller. The Respondent said that he and Flowers were both between the wall and the end of the bench, and that they were side by side, with the Respondent ordering Flowers to put his hands behind his back and attempting to gain control of Flowers' hands in order to handcuff him. The Respondent managed to handcuff Flowers at about the same time that Separ arrived back to assist. The Respondent then closed the cell, had Flowers calm down, and informed his supervisor of what had happened.

He testified that he did not know specifically how Flowers had gotten injured, "but I can speculate that either he hit his head on the bench or the cell area or the floor."

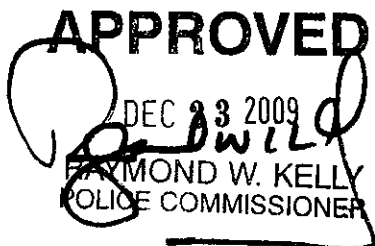
The Respondent denied hitting Flowers with a fist or open hand and further denied hitting Flowers while he was handcuffed. He had no past anger towards Flowers, and that as far as he can remember he didn't even realize who Flowers was until afterwards.

The credible testimony and statements made by O'Brien, Barone, Separ and the Respondent, has convinced this Court that Flowers displayed violent behavior when he refused to be arrested at the scene. He kicked Barone in the stomach and violently fought both Barone and O'Brien while standing and while on the ground, causing Barone to suffer pain from her injuries and O'Brien to receive medical treatment.

This Court is equally convinced that Flowers remained in his violent frame of mind when he was in the holding cell at the stationhouse and attacked the Respondent when he uncuffed one of Flowers' hands while attempting to complete the search of him.

Flowers' statements that his resisting arrest was not of such a nature that would cause injury to the arresting officers or as he indicated in his last interview, that he did not resist at all, is not persuasive to this Court. He is a repeat offender of the criminal justice system who was violently opposed to being rearrested. This is supported by the fact that he is a fugitive from justice due to an outstanding arrest warrant. Moreover, his statements that he remained handcuffed while the Respondent struck him is equally unpersuasive given his violent nature and the credible testimony of the Respondent.

Based on the foregoing this Court finds the Respondent Not Guilty as charged.



Respectfully submitted,

John Grappone
Assistant Deputy Commissioner - Trials